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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

**No. 262**

LORRAINE WILSON AND HULDAH DIEKMANN,
*Petitioners,*
*Appellants below,*

*vs.*

VAN VECHTEN SHAFFER, DON BARNES,
ARTHUR BARLOW, FRANK BYERS,
THE SHORES COMPANY, A CORPORATION, and
SHORES-MUELLER COMPANY, A CORPORATION,
*Respondents,*
*Appellees below.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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*Of Counsel.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

Petitioners pray that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Eighth Circuit entered on April 17, 1944, affirming the decree of the District Court of the United States for the Northern District of Iowa entered April 17, 1943, as to your petitioners, but reversing and remanding said decree of the

District Court as to your petitioners' co-plaintiffs, (Reported at 141 F. 2nd 877), and your petitioners respectfully show:

## I.

### Basis of Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended (43 Stat. 938; 28 U.S.C.A. Sec. 347). The decision of the Circuit Court of Appeals was entered on April 17, 1944.

## II.

### Summary Statement of Matter Involved.

This is a suit in equity brought as a class case in the District Court of the United States for the Northern District of Iowa by petitioners and others, as stockholders of the Shores-Mueller Company, against respondents, who were its officers and directors, to declare a constructive trust with respect to stock of a new corporation, held by the respondents, to which new corporation defendants had caused the old corporation's property and business to be transferred in breach of trust. The exact nature of the breach is not material here. They also prayed for an accounting, that the constructive trust be executed, and general relief.

The respondents filed a motion to dismiss in the District Court alleging several grounds, including former adjudication. The prior case had been filed in the same court, and dismissed on motion as barred by limitations. The parties stipulated that the files and record in the prior case might be considered as in evidence, and the issue disposed of as though it had been raised by answer.

As to other plaintiffs, who were stockholders but not parties to the prior case, the District Court sustained the motion and dismissed this case on the ground that it was barred by the Iowa statute of limitations. (R. 31) As to your petitioners, the court sustained the motion to dismiss on the issue of former adjudication and, accordingly, dismissed the case, as to them, for that reason. (R. 31)

The Circuit Court of Appeals reversed the case as to the other plaintiffs upon the issue of limitations (R. 85), but affirmed as to petitioners on the issue of former adjudication.

The complaint in the former case (R. 32) alleged that "plaintiffs bring this suit in the right of said corporation, as stockholders thereof, and also for themselves as individual stockholders entitled to the assets of said corporation if it be found that the charter of said corporation has been forfeited, or cancelled." In other words, it was a secondary, or derivative, case which was alleged, and it was grounded upon alleged fraud upon the corporation, and conversion of its assets. (R. 37) The charter of the corporation had not been forfeited or cancelled.

The complaint in this case (R. 1) alleges a primary class suit by stockholders on the ground of breach of fiduciary duty by the officers of the corporation, owed to the stockholders directly, without intervention of the corporation. Plaintiffs claimed equitable ownership of stock in a new corporation which defendants had organized and to which they had transferred the property and business of the old corporation in violation of their fiduciary duty to its stockholders. The theory of the case was the following of trust property.

In the former case it was sought to set aside the challenged transactions for fraud, while in this case the object was to recover their product. Recovery is sought in this case

by the stockholders themselves, while in the former case recovery was sought for the corporation, and in its right.

## III.

### Question Presented.

The precise question involved is whether the filing of an action by a stockholder in which only secondary rights are asserted for the benefit of the corporation, is a bar to another action asserting a primary right of the stockholder arising out of the same factual situation.

## IV.

### Reasons Relied on for the Allowance of the Writ.

#### A.

The decision of said Circuit Court of Appeals as to the issue of former adjudication is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit, on the same matter (Supreme Court Rule 38, Par. 5(b)) in the case of *Bogert* v. *Southern Pacific Company*, 244 Fed. 61; affirmed on this issue by this Court, 250 U. S. 483, 490.

#### B.

The Circuit Court of Appeals decided an important question of general or federal law probably in conflict with applicable local and federal decisions, (Supreme Court Rule 38, par. 5(b)), in that it held that a decision in a stockholder's derivative suit, prosecuted in the right of the corporation, against officers to set aside certain transactions for fraud, was a bar to a primary suit by stockholders, affirming those transactions and claiming a trust

in the proceeds, based upon the officers' fiduciary duties owed to the stockholders directly without intervention of the corporation, and the right to follow trust property.

Respectfully submitted,

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EDWARD J. DAHMS,
*Of Counsel.*